

STATEMENT BY
RUSSELL M. ROBERTS
DIRECTOR
FREEDOM OF INFORMATION/PRIVACY ACTS DIVISION
U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

BEFORE THE
SUBCOMMITTEE ON TECHNOLOGY AND THE LAW
COMMITTEE JUDICIARY
UNITED STATES SENATE

AUGUST 2, 1988

Mr. Chairman and members of the Subcommittee on Technology and The Law, my name is Russell Roberts and I am the Director of the FOIA/Privacy Act Division in the Office of the Assistant Secretary for Public Affairs, Department of Health and Human Services (DHHS). Thank you for the opportunity to testify on behalf of DHHS about our administration of the Freedom of Information Act (FOIA).

Several Members of Congress and others have through the years cited DHHS and its predecessor, the Department of Health, Education, and Welfare (DHEW), as a "model agency" for its administration of the FOIA. My appearance here today as a mere practitioner rather than a policymaker is simply another demonstration of the openness of DHHS and the confidence it places in its FOIA operations.

With your approval, Mr. Chairman, I'd like to refer to our history of faithful efforts to comply with both the letter and the spirit of the FOIA.

When the FOIA was enacted in 1966, DHEW Secretary John W. Gardner asked a task force of attorneys, program managers and public affairs officials to develop recommendations on how best to administer the statute in the Department. Mr. Gardner accepted their recommendation that responsibility for FOIA administration be placed in the Office of Public Affairs. They administer the

-2-

FOIA in concert with the General Counsel and with assurance of cooperation by program managers when their records are requested under the FOIA.

Every succeeding Secretary has reaffirmed that decision as well as our long-standing policy of "the fullest responsible disclosure of information consistent with those requirements of administrative necessity and confidentiality which are recognized by the FOIA itself." And nearly every Secretary has taken additional steps to enhance effective implementation of the statute. For example, when Secretary Caspar W. Weinberger published the first major revision and updating of our Regulation implementing the FOIA in 1974 he included a foreward in which he called the FOIA "The public's key to the vast storehouse of government information."

Most recently, Secretary Otis R. Bowen, M. D., has continually focused agency managers' attention on improving administration of the FOIA. In a May 15, 1986 memorandum Dr. Bowen said:

Not only do I expect full compliance with the FOIA and our Regulation but I want this accomplished in the same cost-effective ways as all our other programs. Last year we expended \$7.6 million in responding to 105,687 requests under the Act at an average cost of \$65 per request. Part of that cost was in defending ourselves against requesters who sued us for non-compliance with the statutory time-limits. This is unnecessary, time-consuming, costly litigation that in most instances can and should be avoided.

-3-

In a second memorandum dated April 21, 1988, Dr. Bowen referred to the 1987 FOIA Report to Congress showing that costs of administering the FOIA were reduced by 3.6 percent to \$62 per request in spite of an increase in requests of 4.5 percent to 121,033 from 115,816 in 1986. Referring to those reduced costs Dr. Bowen added:

This is an accomplishment, of course, but much more must be done. As part of our Regulation implementing the FOIA (45 CFR 5) I have delegated authority to release or deny records and to charge, reduce or waive fees for FOIA services to only 9 Freedom of Information Officers. I hold these FOI Officers responsible for protecting personal privacy, trade secrets, confidential business data, and/or preserving the integrity of our decision-making and investigative processes and personnel policies and practices. They are responsible, too, for collecting fees whenever that is appropriate. FOI Officers must have the requisite knowledge and skills to meet those responsibilities. Full cooperation with our FOI Officers and reliance on their expertise for processing FOI requests will conserve valuable program staff time. There are too many instances of program staff time being spent in reviewing and marking records for deletion. This causes delay and is unnecessarily duplicative. It often results in additional wasteful program effort to reproduce unsanitized copies of the records because FOI Officers cannot agree that the deletions are exempt from FOIA's mandatory disclosure requirements or that other portions of the records are exempt.

The full text of these memorandums is attached, together with examples of memorandums issued by Operating Division Heads in compliance with Secretary Bowen's directive that they issue procedural guidance under their signatures to employees at every level in their organizations as soon as possible.

-4-

By limiting authority to release or deny records and charge, reduce or waive fees to only 9 FOI Officers we know what is released and when and we can alert senior managers if there is likely to be controversy or news coverage about disclosures.

Not only do we have FOI Officers with sufficient knowledge, skill and experience to act quickly and precisely in making determinations about records and fees but we have also been able to recruit, train and retain highly competent FOI Specialists. There are approximately 57 FOI Specialists in DHHS and FOI contacts or liaisons in every office. We provide training through the very highly regarded FOIA training programs of the Department of Justice as well as training by the American Society of Access Professionals (ASAP), the U. S. Department of Agriculture's Graduate School and the Office of Personnel Management. Senior FOI Officers continually provide training tailored to the specific needs of DHHS' executive staffs, contract and grants management staff, investigators, personnelists and others including regional office staffs. We and the Department of Defense are the only agencies that have established career ladders for FOI Specialists.

Additionally, we and the Defense Department have long-standing policies intended to make it unnecessary for representatives of

-5-

the news media to resort to using the FOIA to compel disclosure of information. In keeping with our policy of "the fullest responsible disclosure" we cooperate with news media representatives covering DHHS in every way possible to avoid the "second story" to the one they set out to get, the story that they had to resort to the FOIA to obtain facts we should have released.

Our policies recognize that requesters sometimes are confused about their rights of access under the FOIA and the Privacy Act. We process every request, whether presented under the FOIA, the Privacy Act or both or neither, under the statute that will provide the greater access. We also require that every response specifically address the issues of release/nonrelease and whether to charge, reduce or waive fees. This insures that we release the maximum amount of information and that we charge only when that is appropriate. As a result of our fee collections last year we collected 17 percent more than a year earlier. Ours is not a "sock-it-to-'em" attitude but is intended to relieve taxpayer subsidy to the extent possible, especially when the requester will benefit financially by the disclosure of information. Approximately 75 percent of our requests are in the category of "commercial use requester."

The 121,000 FOIA requests we processed last year exceeds that of any other Federal agency. Of these we denied in whole or in part

-6-

only 1,586 or about 1.3 percent. In the main these were good decisions because only 165 or 10 percent of persons denied access to records appealed those initial determinations to higher authorities within DHHS. Data from our 1986 and 1987 annual reports are attached.

Finally, Mr. Chairman, I believe it very significant that DHHS recently has presented me with the Distinguished Service Award, its highest honor. "Significant", Mr. Chairman, not because it honors me, but because it is one more demonstration of the strong support the Assistant Secretary for Public Affairs, Stephanie Lee-Miller, provides her FOI Officer and the significance Dr. Bowen attaches to effective administration of the FOIA.

Thank you, Mr. Chairman, I will, of course, be pleased to respond to questions.



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAY 15 1986

MEMORANDUM TO : HEADS OF OPERATING DIVISIONS
HEADS OF STAFF DIVISIONS
IMMEDIATE OFFICE OF THE SECRETARY

SUBJECT: Improving Administration of the Freedom of Information Act

The Department is now in the process of seeking public comment on proposed revisions to our Regulation implementing the Freedom of Information Act (FOIA). The intent of the proposed new Regulation, the first major revision in this area since 1974, is to improve administration of the Act within DHHS. It was prepared by staff of the Assistant Secretary for Public Affairs.

I believe it is appropriate in this context to reaffirm this Department's policy which calls for the fullest responsible disclosure of information consistent with those requirements of administrative necessity and confidentiality which are recognized by the FOIA itself. Our proposed new Regulation, therefore, represents a balanced approach to meeting the disclosure requirements of the Act while ensuring the protection of personal privacy, the confidentiality of proprietary business information submitted by persons outside the Department, and the integrity of the decision-making and law enforcement processes.

Not only do I expect full compliance with the requirements of the FOIA and our Regulation but I want this accomplished in the same cost-effective ways as all our other programs. Last year we expended \$7.6 million in responding to 105,687 requests under the Act at an average cost of \$65 per request. Part of that cost was in defending ourselves against requestors who sued us for non-compliance with statutory time limits. This is unnecessary, time-consuming, costly litigation that in most instances can and should be avoided.

Of even greater importance is the concern of the Justice Department that lack of coordination between FOIA officers and other agency staff is frustrating litigation efforts of the U. S. Government. Justice notes:

FOIA, of course, is generally available to any person seeking government documents. FOIA requestors often do not identify the parties or the special interests they represent, and almost never indicate whether the requested documents will be used to support ongoing or contemplated litigation against the United States. Compounding the problem, FOIA personnel frequently are not fully aware of the full extent of the governmental interests implicated by a FOIA request. In particular, FOIA personnel often do not know of actual or impending litigation involving the subject matter of the requested documents.

Page - 2

I am sympathetic with the often heavy burden placed upon your staffs when processing FOIA requests in addition to their other duties. However, due to the importance of this issue, I would like you to take the following steps:

1. Require your staffs to inform their designated Freedom of Information Officer whenever the subject matter of a request is also the subject of ongoing or potential litigation.
2. Inform your staffs that only Freedom of Information Officers designated in the Regulation are authorized to release or deny records and charge, waive or reduce fees.
3. Require your staffs to provide requested records to their designated Freedom of Information Officer in a timely fashion, together with identification of their concerns about release.

The Assistant Secretary for Public Affairs is responsible for the administration of the FOIA in this Department. She has my complete support in her efforts to improve administration of the statute and I know she also can count on your assistance.



Otis R. Bowen, M.D.
Secretary

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

APR 21 1983

TO: OPDIV and STAFFDIV Heads

FROM: The Secretary

SUBJECT: Improving Administration of the Freedom of Information Act

The 1987 annual report sent to Congress recently on DHHS' administration of the Freedom of Information Act (FOIA) shows that we now are managing the highest volume of FOIA requests of all Federal agencies in a more cost-effective way than previously.

Total costs of administering the FOIA in 1987 were reduced by 3.6% from \$8,491,004 in 1986 to \$8,168,965 in 1987. This despite an increase of 4.5% in the number of requests from 115,816 in 1986 to 121,033 in 1987. We collected \$961,978 in FOIA fees in 1987, a 17% increase over the \$821,868 collected in 1986. And processing costs were reduced from \$65 per request in 1986 to \$62 per request in 1987.

This is an accomplishment, of course, but much more must be done. As part of our Regulation implementing the FOIA (45 CFR 5) I have delegated authority to release or deny records and to charge, reduce or waive fees for FOIA services to only 9 Freedom of Information Officers. I hold these FOI Officers responsible for protecting personal privacy, trade secrets, confidential business data, and/or preserving the integrity of our decision-making and investigative processes and personnel policies and practices. They are responsible, too, for collecting fees whenever that is appropriate. FOI Officers must have the requisite knowledge and skills to meet those responsibilities. Full cooperation with our FOI Officers and reliance on their expertise for processing FOI requests will conserve valuable program staff time. There are too many instances of program staff time being spent in reviewing and marking records for deletion. This causes delay and is unnecessarily duplicative. It often results in additional wasteful program effort to reproduce unsanitized copies of the records because FOI Officers cannot agree that the deletions are exempt from FOIA's mandatory disclosure requirements or that other portions of the records are exempt.

During 1986-1987 there were at least four (4) law suits in which our failure to meet FOIA's time limits was an issue. This is not acceptable. We must provide FOI Officers with unsanitized FOIA-

Page 2 - OPDIV and STAFFDIV Heads

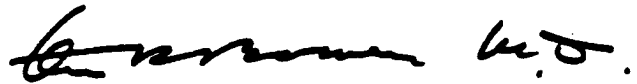
requested records quickly to avoid unnecessary, costly and time-consuming litigation resulting from failure to meet the FOIA's time limits of 10-working days for initial determinations and 20-working days for deciding appeals from initial denials. Delays are themselves costly because of the extra effort required to get records from program offices to FOI Officers.

Attached is suggested procedural guidance that I want distributed under your signature to employees at every level in your organization. This should be done as soon as possible.

We are taking other steps, too, to make our administration of the FOIA more cost-effective.

I will write to the Director of OMB, James C. Miller, III, to seek a review of the OMB decision prohibiting collection of fees for packaging and postage costs for mailing records to Commercial Use Requesters, who benefit financially from FOIA requests. The decision cost HHS alone more than \$200,000 last year.

Finally, we will include in our final FOIA Regulation authority to require payment of fees before releasing records. This is already included in provisions authorizing FOI Officers to refuse to process FOIA requests for persons in arrears for fees incurred in processing an earlier request. These measures should help reduce delinquency in payment of fees.



Otis R. Bowen, M.D.

Attachment

CY 1986

AGENCY	TOTAL FOIA REQUESTS RECEIVED	TOTAL COSTS INCL. APPEALS	PROCESSING COSTS	COST PER REQUEST	TOTAL FEES COLLECTED
Office of the Secretary ^{1/}	758	\$ 288,017	\$ 146,177	\$193	\$ 14,493
Office of Human Development Services	81	7,025	6,796	84	715
Public Health Service					
Assistant Secretary for Health ^{2/}	732	187,420	142,172	194	11,854
Centers for Disease Control	760	183,749	151,595	199	12,377
Food and Drug Administration	44,147	3,681,040	3,644,303	83	376,779
National Institutes of Health	1,382	292,978	282,433	204	27,185
SUBTOTAL	47,021	4,345,187	4,220,503	90	428,195
Social Security Administration	6,912	839,909	662,930	96	15,768
Health Care Financing Administration	61,044	2,732,095	2,662,387	44	362,697
Office of the General Counsel ^{3/}		268,771			
TOTAL	115,816	\$8,481,004	\$7,698,792	\$ 66	\$821,868

^{1/}Effective March 20, 1986, Regional FOIA responsibilities were centralized to the Office of the Director, FOIA/Privacy Act Division, Office of the Assistant Secretary for Public Affairs, Office of the Secretary. The transfer of authority preceded abolishment of the position of Regional Public Affairs Director, which held Regional FOIA responsibilities. Also includes Family Support Administration (FSA) which was established on April 1, 1986.

^{2/}Also includes Health Resources and Services Administration and Alcohol, Drug Abuse, and Mental Health Administration

^{3/}Office of the General Counsel attorneys provided legal services to headquarters, program and regional offices on request processing, appeals, FOI litigation, and policy and regulations development at a total annual cost of \$268,771.

AGENCY	Initial Decisions Not to Comply Under Sec. 552(a)	AUTHORITY RELIED UPON FOR EACH INITIAL NON-COMPLIANCE DETERMINATION																
		Exemptions Used in 552(b)							Other Statutes						Other Authority			
		(Number of exemptions may exceed total initial deci- sions not to comply because more than one exemption may have been invoked.)							18 USC 1905	21 USC 331j & 21 USC 360j	26 USC 6103	42 USC 242m	42 USC 1320c-15	42 USC 1395bb	Rule 6(e) FRCP	Non-pos- session of records	Inadequate Identity	Refusal to pay
		(1)	(2)	(3)	(4)	(5)	(6)	(7)										
Office of the Secretary*	292	0	2	5	59	136	89	84						3	2	14	0	3
Office of Human Development Services	18	0	0	0	12	10	2	0								3	0	0
Public Health Service																		
Assistant Secretary for Health**	48	0	0	0	22	27	15	1								29	6	0
Centers for Disease Control	81	1	0	1	39	24	37	0				1				114	0	0
Food and Drug Administration	581	0	1	0	254	32	11	316	130	249						0	0	0
National Institutes of Health	37	0	0	0	16	24	20	5								79	25	14
SUBTOTAL	747	1	1	1	331	107	83	322	130	249		1				222	31	14
Social Security Administration	432	0	6	76	46	15	307	0			76					168	93	3
Health Care Financing Administration	186	0	55	1	60	45	66	8					1			17	0	0
TOTAL	1,675	1	64	83	508	313	547	414	130	249	76	1	3	1	2	424	124	20

*See TAB A, p.1. Footnote 1/

**See TAB A, p.1. Footnote 2/

AGENCY	Intra-agency appeals Under Subsection (a) (6)				AUTHORITY RELIED UPON FOR TOTAL OR PARTIAL DENIALS ON APPEALS								OTHER STATUTES	
	Total Appeals	Granted in full	Denied in full	Denied in part	Exemptions Used in 552 (b) (2) (Number of exemptions cited may exceed total appeals because more than one exemption may have been invoked.)								26 USC 6103	42 USC 242m(d)
Office of the Secretary ^{4/}	50	5	36	9	(1)	(2)	(3)	(4)	(5)	(6)	(7)			
Office of Human Development Services	0													
Public Health Service ^{5/}	58 ^{6/}	17	26	13	0	0	1	16	15	5	11		1	
Social Security Administration	46 ^{7/}	7	26	9	0	4	4	2	8	23	1	4		
Health Care Financing Administration	15	1	11	3	0	1	0	2	5	5	1			
TOTAL	169	30	99	34	0	6	5	22	61	45	22	4	1	

^{4/}The Assistant Secretary for Management and Budget is responsible for appeals decisions for the Office of the Secretary and the 10 Regional Offices. (During an organizational transition--4/1/86 - 12/31/86--ASMB also served as appeals official for the Family Support Administration (FSA).)

^{5/}The Assistant Secretary for Health is responsible for appeals decisions for all components of the Public Health Service including: Office of the Assistant Secretary for Health, Centers for Disease Control, Food and Drug Administration, Health Resources and Services Administration, National Institutes of Health, and Alcohol, Drug Abuse, and Mental Health Administration.

^{6/}Includes 2 appeals of non-possession of records.

^{7/}Includes 1 appeal of fee waiver denial; 2 appeals of non-possession of records; and 1 appeal withdrawn.

AGENCY	Number of instances in which it was necessary to seek a 10-day extension		
	Because search involved field facilities or other establishments	Because search involved voluminous amount of records	Because consultation with other agencies or components was required
Office of the Secretary*	0	0	3
Office of Human Development services	4	1	1
Public Health Service			
Assistant Secretary for Health**	0	40	10
Centers for Disease Control	5	10	8
Food and Drug Administration	0	0	0
National Institutes of Health	0	0	0
SUBTOTAL	5	50	18
Social Security Administration	0	1	0
Health Care Financing Administration	14	14	3
TOTAL	23	66	25

*See TAB A, p.1. Footnote 1/

**See TAB A, p.1. Footnote 2/

CY 1987 AGENCY	Intra-agency appeals Under Subsection (a) (6)				AUTHORITY RELIED UPON FOR TOTAL OR PARTIAL DENIALS ON APPEALS Exemptions Used in 552 (b) (2) (Number of exemptions cited may exceed total appeals because more than one exemption may have been invoked.)							OTHER STATUTES		
	Total Appeals	Granted in full	Denied in full	Denied in part	(1)	(2)	(3)	(4)	(5)	(6)	(7)	26 USC 6103	42 USC 1320 C-9	Ethics in Government
Office of the Secretary	42 ^{1/}	2	26	12	0	1	1	1	16	14	15		1	
Family Support Administration	1	1	0	0										
Health Care Financing Administration	1	0	0	1	0	0	0	0	1	0	0			
Office of Human Development Services	0													
Public Health Services ^{2/}	47 ^{3/}	2	31	11	0	0	1	15	17	8	5			1
Social Security Administration	74	5	57	12	0	3	10	2	3	48	0	10		
TOTAL	165	10	114	36	0	4	12	18	37	70	20	10	1	1

1/ Includes 2 appeals of non-possession of records.

2/ The Assistant Secretary for Health is responsible for appeals decisions for all components of the Public Health Service.

3/ Includes 3 appeals of non-possession of records.

Declassified and Approved For Release 2013/01/03 : CIA-RDP91B00389R000500190010-6										AUTHORITY RELIED UPON FOR EACH INITIAL NOT COMPLYING DETERMINATION								
AGENCY	Initial Decisions Not to Comply Under Sec. 552(a)	Exemptions Used in 552(b) (Number of exemptions may exceed total initial deci- sions not to comply because more than one exemption may have been invoked.)							Other Statutes					Other Authority				
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	18 USC 1905	21 USC 331j & 21 USC 360j	26 USC 6103	42 USC 242m	42 USC 1320c-9	35 USC 205	Ethics in Gov.	Non-pos- session of records	Inadequate Identity	Refusal to pay
Office of the Secretary	253 ^{1/}	1	1	4	57	109	85	77					4			22	0	0
Health Care Financing Administration	237	0	64	0	58	46	95	3								4	0	0
Public Health Service	8	0	0	0	4	3	1	0								13	0	0
Assistant Secretary for Health Alcohol, Drug Abuse, and Mental Health Administration	9	0	0	0	5	2	4	1								5	0	0
Centers for Disease Control	89	0	0	0	38	19	53	2				1				15	6	0
Food and Drug Administration	443	0	0	0	218	19	8	220	122	142						0	0	0
Health Resources and Services Administration	6	0	0	0	3	3	3	1								6	4	2
National Institutes of Health	38	0	0	2	20	19	17	4					1	1	1	103	17	9
SUBTOTAL	593	0	0	3	288	65	86	228	122	142		1	1	1		142	27	11
Social Security Administration	503	0	9	98	15	21	375	1			98					303	148	5
TOTAL	1,586	1	74	105	418	241	641	309	122	142	98	1	4	1	1	471	175	16

^{1/} Includes 7 denials signed by staff of Office of Human Development Services before the function was transferred to the Office of the Secretary.

AGENCY	TOTAL FOIA REQUESTS RECEIVED	TOTAL COSTS INCL. APPEALS	PROCESSING COSTS	COST PER REQUEST	TOTAL FEES COLLECTED
Office of the Secretary <u>1/</u>	849	\$ 253,230	\$ 140,700	\$166	\$ 7,891
Health Care Financing Administration	66,775	2,540,295	2,503,759	38	544,983
Public Health Service	190	90,604	36,860	194	2,523
Assistant Secretary for Health	212	70,568	68,993	325	7,578
Alcohol, Drug Abuse, and Mental	867	191,217	190,083	219	5,217
Health Administration	41,500	3,700,552	3,670,901	88	355,706
Centers for Disease Control	222	20,648	12,118	55	5,621
Food and Drug Administration	1,220	283,977	270,777	222	15,210
Health Resources and Services					
Administration					
National Institutes of Health					
SUBTOTAL	44,211	4,357,566	4,249,732	96	391,855
Social Security Administration	9,198	770,743	593,105	64	17,249
Office of the General Counsel <u>2/</u>		247,131			
TOTAL	121,033	\$8,168,965	\$7,487,296	\$ 62	\$961,978

1/ Includes Family Support Administration and Office of Human Development Services.

2/ Office of the General Counsel attorneys provided legal services to headquarters, program and regional offices on request processing, appeals, FOI litigation, and policy and regulations development at a total annual cost of \$247,131.